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Kakar Advocates LLC is a full-service law firm based in Kabul, Afghanistan, with US, European and Afghan-licensed attorneys with an extensive range of backgrounds and experiences; the firm comprises 25 professional staff, with 12 lawyers and two paralegals. Kakar Advocates provides services to prominent national and international clients in both the private and public sectors, from general legal services, to tax and financial advice, and to development and strategic consultancy services. The firm advises both public and private clients with respect to all aspects of the mining sector, including: contract negotiation, drafting and review; environmental issues; land expropriation; contract eligibility, licensing, and other matters. Kakar Advocates has a prominent legislative monitoring programme, and also has significant experience in legislative drafting.

DLA Piper is a global law firm with more than 5,000 lawyers located over 90 offices in more than 40 countries. The firm has a dedicated global mining and minerals practice that operates and services all of the major regions in the world. DLA Piper offer life-of-project legal services, including: project structuring (corporate structures, tax efficiency, finance structuring and documentation, etc); construction and project delivery/management; risk allocation and contract documentation; regulatory approvals, licensing and concessions; environment, native title and heritage approvals; supply chain management (including third-party access); offtake, sale and purchase contracts and marketing agreements; procurement strategies; dispute resolutions and arbitrations; mining operations; M&A and capital raising; labour relations and workplace safety; mine closure and divestment.

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abilities. Mr Kakar has been involved in some of the largest mining contracts in Afghanistan, and his firm is recognised as being on the leading edge in the mining sector.



Cheryl Dickson is special counsel for DLA Piper. Her core legal skills are advising clients on joint ventures and commercial agreements. Cheryl has experience in the energy, oil and gas and mining industries both in Australia and internationally and has advised clients in the drafting and negotiation of farm-in agreements, unincorporated and incorporated joint ventures, royalties, production-sharing contracts, concession contracts, joint-venture agreements, joint operating agreements and other commercial agreements. She has recently been involved in advising the Government of the Islamic Republic of Afghanistan and, in particular, the Ministry of Mines and Petroleum on the preparation of the new Minerals Law for Afghanistan. Cheryl is a member of the Law Society of Western Australia; as well as being an accredited solicitor in Australia, she is also a Solicitor of the Senior Courts of England & Wales.



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1. General Structure of Mineral Ownership and Regulation

1.1 Ownership of Mineral Deposits

The Constitution of Afghanistan and the Minerals Law state that all minerals are the property of the State.

Minerals become the property of the licence-holder once extracted from the subsoil in accordance with the terms of a licence. It is important to note that a licence granted under the Minerals Law constitutes a proprietary interest but is not an interest in the land the subject of the licence.

1.2 Regulation of Mining Industry

The legislative framework regulating the mining industry in Afghanistan is comprised of the following laws and regulations:

- Constitution of Afghanistan;
- Minerals Law – this is currently signed by the President and awaits publication (Minerals Law);
- Oil and Gas (Hydrocarbons) Law, Official Gazette No 1277, dated 11 December 2017 (Hydrocarbons Law);
- Environment Law, published in Official Gazette No 912, dated 25 January 2007 (Environment Law);
- Evaluation of Environmental and Social Impacts Regulation, Official Gazette No 1276, dated 9 December 2017;
- Mineral Processing Regulation, Official Gazette No 1007, dated 31 December 2009;
- Hydrocarbon Regulation, Official Gazette No 1000, dated 1 November 2009.

1.3 Independent Regulations for Mining

The Hydrocarbons Law specifically regulates liquid hydrocarbons and natural gases, which are expressly excluded from the scope of the Minerals Law.

1.4 Administration of the Mining Industry

The Ministry of Mines and Petroleum (Ministry) is responsible for implementing and administering the Minerals Law and regulating the activities authorised under the Minerals Law. Cabinet, the High Economic Council, the National Procurement Commission (NPC), the National Procurement Authority (NPA) and the Mining Technical Committee (Committee) all have important and specific roles in the different decision-making processes under the Minerals Law.

With the introduction of the new Minerals Law in 2018, the Ministry underwent a structural change to focus its resources on its key function as regulator and policy maker. The Geological Survey now reports directly to its own Deputy Minister established within the Ministry. The Geological Survey's key function is to operate as the knowledge depository for mining-related information in Afghanistan. To facilitate this, the Geological Survey is permitted to conduct reconnaissance activities, is required to maintain the

cadastral survey map and compile and maintain public data bases of geological information and is responsible for analysing data generated by minerals activities.

The Committee is established and regulated under the Minerals Law. The Committee is comprised of the Deputy Minister responsible for the Geological Survey and the Deputy Minister of Technical Affairs (or their delegates), as well as five appointed members, all of whom have specific skills and experience in areas such as mining, finance and legal services. The purpose of the Committee is to provide technical input to the decisions made under the Minerals Law; this includes making recommendations in respect of the declaration of large-scale mining areas, small-scale mining areas and prohibited areas as well as evaluating applications for small-scale mining licences, feasibility studies and mining proposals.

The NPA and the NPC are established under the Procurement Law published in Official Gazette 1223, dated 17 September 2016. Under the Minerals Law, the NPA performs a checks and balances function to ensure that the bidding processes to award mining concessions are conducted in accordance with the requirements of the Minerals Law. The NPA must prepare an audit report in relation to the bidding process, that report is then considered by the next level decision-making bodies, which are the High Economic Council and the NPC, in deciding whether to approve or reject the award of the mining concession or terminate the bidding process. The NPC's role under the Minerals Law is limited to this function.

The High Economic Council is involved in a number of decisions under the Minerals Law, including approving or rejecting the award of a mining concession or terminating the bidding process before the preferred bidder is put to Cabinet, who is the ultimate decision-maker. The High Economic Council's approval is required in relation to declaring an area of land as either open or closed for mining activities, suspending a large-scale licence, compulsorily acquiring land and granting an exploitation licence to an exploration licence-holder.

Cabinet's key function under the Minerals Law is to endorse or reject the award of a mining concession or terminate the bidding process. However, Cabinet is also responsible for approving or rejecting declarations declaring an area of land as either open or closed for mining activities, determining the salaries of the Committee members and approving restricted mineral programmes.

2. Required Authorisations and Permits

2.1 Requirements to Conduct Prospecting

There is no specific permit or authorisation solely for prospecting under the Minerals Law, however artisanal operations are permitted under a small-scale mining licence. The holder of a small-scale mining licence, exploration licence and exploitation licence is also permitted to conduct rock-chip sampling.

As mentioned, the Geological Survey is allowed to conduct reconnaissance activities.

The Ministry may conduct, or appoint someone to conduct, reconnaissance activities for the purpose of declaring land open or closed for mining activities. The Ministry is not permitted to conduct reconnaissance activities on land which is declared restricted and therefore closed for mineral activities.

2.2 Requirements to Conduct Exploration

The new Minerals Law of 2018 streamlined the types of licences that can be granted. There are two types of projects contemplated by the new Minerals Law, being small-scale mining projects and large-scale mining projects.

Small-scale mining licences can only be granted in respect of a small-scale mining area. Small-scale mining licences are granted on the basis of an application and are considered on a first-in-time basis.

Large-scale mining can only be conducted in respect of a large-scale mining area. For large-scale mining projects, a mining concession must be awarded, which can only be done after a competitive bidding process. An exploration licence is granted under the mining concession.

Exploration is defined broadly to include any activity which is necessary or expedient for the purpose of identifying the mineral composition of land or waters or assessing the feasibility of mining and processing minerals. A small-scale mining licence, exploration licence or exploitation licence allows the holder to conduct exploration activities.

Please refer to **2.3 Requirements to Conduct Mining** for further information.

2.3 Requirements to Conduct Mining

As noted above, there is a distinction made in the Minerals Law between small-scale and large-scale mining projects. In order for an area of land to be open for the development of either small-scale mining projects or large-scale mining projects, a declaration must first be made to designate the area as either a 'small-scale mining area' or a 'large-scale mining area'.

A small-scale mining licence is granted by application on a first-in-time basis. Once applied for and granted, a small-scale mining licence allows the holder to conduct exploration, mining and processing activities. A small-scale mining licence cannot be granted in respect of select minerals such as iron ore, manganese and copper.

The holder of an exploitation licence may conduct exploration, mining and processing activities. An exploitation licence, being the licence for large-scale mining projects, can only be granted under a mining concession following a competitive bidding process, the steps of which are set out in the Minerals Law.

There are two different types of mining concessions under the Minerals Law, a single stage mining concession which provides for the grant of only an exploitation licence and a two-stage mining concession which provides for the grant of an exploration licence and the right of priority to the grant of an exploitation licence. It is important to note that the two-stage mining concession only provides the right of priority and not a right of grant of an exploitation licence.

In order for a holder of a two-stage mining concession to be granted an exploitation licence, the holder must lodge a number of required documents with the Ministry, including a mining proposal, a feasibility study and an environmental management plan. These documents are considered by the Committee who then provide a mine development report to the High Economic Council. In this circumstance, the High Economic Council determines whether to grant the exploitation licence.

2.4 Environmental Requirements to Conduct Exploration and Mining

In addition to all licence holders being required to comply with the Environment Law, licence holders and applicants for small-scale mining licences must prepare and lodge proposed environmental management plans. To the extent an environmental impact statement or a comprehensive mitigation plan is required under the Environment Law, the environmental management plan must meet the requirements of those documents.

Holders of exploration or exploitation licences must lodge the proposed environmental management plan and have the plan approved prior to commencing ground-disturbing works. In relation to small-scale mining projects, the proposed environmental management plan forms a part of the application for the small-scale mining licence. Failure to include the proposed environmental management plan may result in a rejection of the application.

The National Environmental Protection Authority (NEPA) is responsible for reviewing proposed environmental management plans and assessing whether the plan will avoid,

minimise, mitigate and remediate impacts to the environment caused by the conduct of mineral activities as required under the Minerals Law. NEPA may require a licence-holder or applicant to amend the proposed environmental management plan or it may decide to impose conditions on the proposed environmental management plan.

3. Duties and Rights Derived from a Mining Title or Concession

3.1 Rights Granted by a Mining Title to Holder

At a high level, holders of all licence types have the exclusive right to conduct exploration, access the licence area with personnel, remove samples, construct and use infrastructure and extract and use surface and ground water in accordance with the applicable law.

In addition to these rights, as mentioned above, a small-scale mining licence and an exploitation licence also give the holder the right to conduct mining and processing activities and to sell the product produced from these activities.

3.2 Duties Acquired by the Title Holder

Before a licence can be granted, any required performance bond or environmental bond must be provided in accordance with the terms of the mining concession or licence.

Once granted, each licence type is subject to specific standard conditions as well as conditions unique to that licence type as set out in the Minerals Law. These conditions include that the licence holder must pay the surface rent, notify the Ministry of a change in the holder's beneficial ownership, comply with financial and environmental reporting requirements, lodge and have approved specific plans, obtain any necessary permits before constructing infrastructure and construct that infrastructure.

Licence-holders may also be required to comply with additional conditions imposed on applicable work programmes and plans.

The new Minerals Law also introduced new transparency requirements which require licence-holders to disclose details of beneficial ownership which are published.

If a licence-holder is a company, it must obtain the written approval of the Ministry before it can allow a change in its beneficial ownership which will result in a person acquiring 50% ownership or voting power in the holder. A licence-holder must also obtain the written approval of the Ministry before it can transfer the licence to another person.

3.3 Rights Acquired by the Title Holder

Please refer to **3.1 Rights Granted by a Mining Title to Holder** for further information.

3.4 Duties Acquired by the Landowners

A licence-holder must obtain the consent of the owner or occupier of land prior to undertaking mineral activities within 250 metres of any house, building or cultivated land. If the mineral activities will be conducted on land that is not within 250 metres of any house, building or cultivated land, then the licence-holder must consult with the owner or occupier in order to avoid or minimise any conflict between the mineral activities and the activities of the owner or occupier.

If consent is not given by the owner or occupier, then the land may be compulsorily acquired under the Expropriation Law published in Official Gazette No 1258, dated 8 February 2017 (Appropriation Law).

A licence-holder may be required to pay compensation to an owner or occupier for any loss suffered as a result of the conduct of the Mineral Activities. If the licence-holder and the owner or occupier cannot reach agreement as to the quantum of compensation then the matter may be referred to the Valuation (Pricing) Committee established under the Appropriation Law.

3.5 Duties of the Title Holder at End of the Title

A licence-holder must, unless the Ministry advises otherwise, remove any infrastructure constructed on the licence area by the holder prior to expiry or relinquishment of the licence or within 90 days if the licence being revoked.

The licence-holder must also provide all mineral samples and drill core and a copy of all exploration data to the Geological Survey at the expiry or revocation of the licence.

Please refer to **4.3 Environmental Obligations** for further information.

4. Environmental

4.1 Principal Environmental Laws

The principal law affecting the mining industry in relation to the environment is the Environment Law.

4.2 Bodies of Environmental Competence

The NEPA is the authority that maintains environmental integrity and promotes the sustainable use of natural resources.

4.3 Environmental Obligations

A licence-holder is under an obligation to avoid, minimise, mitigate and remediate impacts to the environment caused by the conduct of Mineral Activities including by rehabilitating the land the subject of the licence area.

As mentioned in **2.4 Environmental Requirements to Conduct Exploration and Mining**, licence-holders and applicants for small-scale mining licences are required to lodge and have approved environmental management plans and NEPA may decide to impose additional conditions on that plan.

The Ministry may only approve the relinquishment of land if it is satisfied that the licence-holder has complied with commitments under the environmental management plan.

5. Miscellaneous

5.1 Special Rules or Taxes

Foreign persons and entities which are not incorporated under the laws of Afghanistan or that are majority-owned by a person who is a foreign person are not eligible to hold small-scale mining licences.

The tax laws apply equally to all natural and legal persons, whether foreign or domestic.

5.2 Restricted or Excluded Zones

The Ministry may declare land a prohibited area if it considers it to be in the public interest to prohibit mineral activities on the land, having regard to factors such as national security, health and safety, environmental protection, the preservation of archaeological or cultural sites, the incompatibility of mineral activities with other land uses and any other factors prescribed in the Regulations. Before declaring land closed for mining, the Ministry must obtain a recommendation of the Committee and approval of Cabinet.

The Ministry must not undertake a bidding process for the award of a mining concession or grant a licence in respect of land that is closed for mineral activities.

Certain minerals are considered restricted minerals under the Minerals Law, these include those defined as radioactive minerals and rare earth elements as well as beryllium, lithium and any other minerals set out in the Regulations.

Any exploration and exploitation activities in respect of restricted minerals may only be carried out under a restricted minerals programme. A restricted minerals programme must be endorsed by the High Economic Council, following consultation with the National Security Council, and approved by Cabinet.

5.3 Rights of Indigenous or Ethnic Communities

A person seeking to be granted an exploitation licence must consult with the local community and lodge a proposed community development plan with the Ministry and have that plan approved prior to commencing ground disturbing works.

The community development plan should demonstrate how the licence-holder will contribute to the welfare of the local community and must comply with any other requirements in the regulations. The Ministry may approve the plan and impose conditions or require amendments to the plan.

A total of 5% of revenue paid into the general revenue account of the State from exploration licences and exploitation licences and 8% from small-scale mining licences is appropriated to the Provincial Development Fund annually.

The Independent Directorate of Local Governance is responsible for ensuring that revenue appropriated to the Provincial Development Fund is either invested in initiatives for the benefit of the local community or transferred to a municipal incentive fund and invested in initiatives for the benefit of municipalities in the relevant province.

5.4 Unilateral Termination of a Mining Title

With the prior recommendation of the Committee and approval of the High Economic Council, the Ministry may terminate a mining concession either in accordance with the terms of the mining concession or if the concession-holder ceases to be eligible under the Minerals Law.

The Ministry may, with a recommendation of the Committee and the approval of the High Economic Council, revoke a licence:

- in the event of a material non-compliance with the Minerals Law or a condition of the licence;
- upon termination of the mining concession under which an exploration licence or an exploitation licence is granted; or
- if the licence-holder ceases to be eligible under the Minerals Law.

5.5 Taxes or Royalties

Holders of exploration licences are not required to pay a royalty as they are not permitted to sell product.

The royalty rates for minerals, other than construction materials, is set out in the Minerals Law. The rates differ depending on the level of processing the mineral has undergone at the time of its disposal. The applicable royalties are as follows:

- for natural minerals extracted from the ground but not processed other than crushing or screening, the rate is 7.5%;
- for concentrate, *doré* and any other products designated in the regulations which are produced by processing to achieve a specific concentration, the rate is 5%; and
- for refined metals which are produced by processing including by smelting or refining to achieve a specific concentration, the rate is 2.5%.

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A licence-holder must lodge a royalty report and audited accounts with the Ministry. The Ministry may, either of its own decision or by request of the Committee, conduct an audit to determine whether the content of a royalty report is accurate. The Ministry will report its findings to the Committee. After considering the report, if the Committee determines there has been a shortfall in the royalty, the licence-holder will be required to pay the shortfall and may be liable for a penalty or prosecution for providing false information in a royalty report.

In circumstances where a licence was granted under a previous version of the Minerals Law, the above-described royalty rates will not apply and the original royalty rate will continue to apply. However, the above-described royalty regime will apply in the event that the licence is converted to either a small-scale mining licence or a mining concession under the Minerals Law.

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